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SUPREME COURT OF THE UNITED STATES

October, 1984

DUGAN & MEYERS CONSTRUCTION CO., INC. and THE GOETTLE CO., JOINT VENTURE,
Petitioner,

v.

WORTHINGTON PUMP CORPORATION (USA),
Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly determined, under the law of the State of Ohio, that an equipment supplier's limited warranty terms in its offer to sell equipment to a general contractor, which was bidding on a municipal contract, are enforceable against the general contractor when the contractor is awarded the general contract and the equipment suppliers' offer is accepted.

2. Whether the court of appeals properly determined, under the law of the State of Ohio, that implied warranties are not created in favor of a general contractor when: (a) The general contractor does not rely on the skill and judgment of an equipment supplier to select or furnish all of the equipment supplied; or (b) the general contractor does not rely on the skill and judgment of an equipment supplier to select or furnish a complete system when the equipment supplied was only a part of the larger system which the general contractor, and not the equipment supplier, was obligated to furnish under the general contract.

3. Whether the court of appeals properly determined, under the law of the State of Ohio, that an equipment supplier does not breach an implied warranty when there is no evidence of a failure of the equipment to meet the buyer's specifications and when there is no evidence of a defect in the equipment at the time of delivery to the buyer or at any other time.

DISCLOSURE OF CORPORATE RELATIONSHIPS

At the time suit was filed, respondent, Worthington Pump Corporation (USA), was a subsidiary of Worthington Pump, Inc. which was in turn a subsidiary of McGraw-Edison Company. Both subsidiaries later became a division known as the Worthington Group of McGraw-Edison Company.

On February 15, 1985, the Worthington Group became the Worthington Pump Division of Dresser Industries, Inc.

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OPINIONS BELOW

The opinion of the court of appeals (Pet.App. 1a-23a) is reported at 746 F.2d 1166. The opinion of the district court (Pet.App. 24a-48a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet.App. 49a-50a) was entered October 26, 1984. Order denying petition for rehearing en banc (Pet.App. 51a-52a) was entered December 10, 1984. The petition for writ of certiorari was filed on March 11, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Respondent, Worthington Pump Corporation, is a manufacturer of pumps, as its name reveals. That is all that Respondent does.

In May 1974, Respondent submitted its proposal and offer to sell 8 pump units to a number of general contractors to be included in the general contractors' bids to the City of Cincinnati (the "City") for improvements to the secondary treatment portion of the Little Miami Waste Water Treatment Plant (the "Plant"). The Plant is owned and operated by the City of Cincinnati's Metropolitan Sewer District (the "District").[1] An explanation of the bidding procedure and the work to be performed and performed in the construction of the Plant is necessary.[2]

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[1] The improvements were being made under an Environmental Protection Agency Federal Participation contract.

[2] This is necessary because the bidding procedure and work to be performed are described clearly in the extensive terms of the bid invitation documents. The terms contained in the bid invitation documents, upon award of the bid to Petitioner, became the terms of the construction contract between the District and the Petitioner. Those terms were wholly overlooked by the district court. Consequently, the district court's findings and conclusions in contradiction of those explicit terms were held to be "clearly erroneous" by the court of appeals. (*E.g.* Pet.App. 13a).

In early 1974, The District published invitations for bids for improvements to the secondary treatment portion of the Plant. The bid invitation documents are known as "Contract 3". In addition to extensive general provisions, Contract 3 consisted of four parts: 3A, B, C and D. These covered, respectively: general construction, plumbing installation, HVAC installation and electrical installation. Contract 3 was made up of 44 individual work items. There eventualy were four successful bidders which became the four "prime or general contractors" for each of the four parts of Contract 3.

Responses to the District's bid invitation were to be made by May 21, 1974. As noted above, Respondent submitted separate proposals to sell 8 pump units (specified in the bid documents as a "Major Equipment Offering") to substantially all of the general contractors known to Respondent to be bidding on Contract 3A (general construction). These included The Goettle Company and the eventually successful bidder, Dugan & Meyers, Inc.[3]

"Major Equipment Offerings," of which there were several contained in the bid documents, were subject to special, detailed and extended specification and bid requirements which were not applicable to other equipment supplied under Contract 3. In addition, even more extensive specification data ("supplementary information") was *required* by the bid documents to be submitted with any proposal to sell the

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[3] Dugan & Meyers, Inc., through its wholly owned subsidiary, Engineering Construction Inc., ("ECI"), was the successful bidder for the general construction, known as "Contract 3A". At some later time, Dugan & Meyers, Inc. entered into a joint venture with The Goettle Company, which had been an unsuccessful bidder for the general construction portion of the contract. The Goettle Company, under a subcontract arrangement, performed those work items of Contract 3A which generally involved installation of the mechanical equipment and related piping. Dugan & Meyers and Goettle are the Petitioner. Although the equipment purchased from Respondent was purchased by Dugan & Meyers, Inc. and the contract was awarded to its wholly owned subsidiary (ECI), the term "Petitioner" is used in this brief to describe one or more of the involved entities both individually and collectively.

specific pump units which Respondent offered to sell. These pump units were listed under work Item 21 of the bid documents.

Item 21 of Contract 3 involved the "Mixed Liquor Pumping Equipment," which is the equipment necessary to pump effluent ("mixed liquor") from aeration tanks to final settling tanks. The following is the introductory description of the "work included" under Item 21:

> The *Contractor* shall furnish and install at the locations shown on the drawings or as required, a complete mixed liquor pumping installation consisting of eight (8) horizontal, centrifugal, mixed flow type pumps, driven by variable speed, wound rotor motors. Drivers and pumps shall be direct connected through flexible couplings and mounted on a common bedplate. Included also is the complete control installation. Two complete systems will be furnished, one for each bank (east and west) of pumps, each bank consisting of four (4) pumps. The above is a general description of the equipment required, however, the intent of this specification is to require an installation complete in every detail. Consequently, the *Contractor* will be responsible for all accessories, appurtenances and any special construction which may be necessary to properly complete the work of this Item. The price bid under this item shall include the cost of all materials and labor required. (Emphasis added).

Respondent's proposal in May, 1974 to sell the pump units included Respondent's submission of the detailed "supplementary information" which, as noted above, was required to be submitted by the bid specifications for this "Major Equipment Offering."

Respondent's proposal to Petitioner was designated "Our Quote CLV-129-74E-PL". As one of the terms and conditions of its proposal, Respondent stated:

> The following comments apply to our quotation: Little Miami Wastewater Treatment Plant Improvements Sewer No. 1790, Contract No. 3.

1) The attached Worthington Standard Conditions of Sale, Form DO-531R5 are part of this proposal, which is made on behalf of the Worthington Corporation subsidiary which will invoice and deliver the equipment.

The printed standard conditions of sale which were referred to and which were attached to Respondent's May, 1974 proposal included, among others, Respondent's 12 month express warranty and a valid and uncontested disclaimer of implied warranties. In its proposal, Respondent *extended* its standard warranty from 12 months from shipment to 18 months from shipment. Similar if not identical, but less extended warranties than that which was made by Respondent, were included in the proposals of *all* pump manufacturers who offered to supply the same major equipment to Petitioner as Respondent offered to supply. Such warranties also were admitted by Petitioner to be standard in the industry.

Respondent's May, 1974 proposal also stated that payment was to be made at the rate of "90% on delivery 10% on acceptance not to exceed 180 days from shipment."

The District's bid documents specified two approved pump manufacturers for the major equipment pumps included in Item 21: DeLaval Turbine and Respondent. (Respondent's standard "MN series mix flow pumps" were specified in the bid documents by exact name).

The bid documents permitted the bidder on Contract 3A to list an unapproved pump manufacturer for Item 21; and to include the unapproved manufacturer's proposed price in the total contract 3A bid price. However, the bid documents also *required* that the bidder include, in addition to the bid price quoted by any unapproved manufacturer, the bid price made by one or the other of the two specified manufacturers, either DeLaval or Respondent. *If the bidder failed to do so, and the unapproved manufacturer was found not to meet the specifications, then the bidder would be required to furnish the equipment of one or the other of the two specified manufacturers "at no increase in cost" over the total bid price.*

In its bid, Petitioner listed an unapproved manufacturer, Morris Pump. Petitioner erroneously failed to include, in its bid, the bid price quoted by one or the other of the two specified manufacturers as required by the bid documents. Petitioner's bid for Contract 3A was the lowest, but Petitioner could *not* be awarded the contract because Morris Pump failed to meet the bid specifications. No other bidder had been listed and neither of the specified manufacturers had been listed by Petitioner. At this point, Petitioner was faced with one of two choices: either forego its winning bid or substitute Respondent as one of the specified pump manufacturers.[4] Because the bid documents provided that there could be "no increase in cost," the latter course of action would mean that Petitioner would have to absorb, out of its total Contract 3A bid price, the amount by which Respondent's offer exceeded that of the offer made by the unapproved manufacturer Morris Pump. The increased amount would have to be absorbed within the limits of Petitioner's total bid price.

In addition to its own pumps, as specified in the bid documents, Respondent had offered to supply to Petitioner, by subcontract, Westinghouse motors and Westinghouse controls. These were two subcontracted items required to be included, along with the pumps, in the lump sum major equipment offering made by the pump manufacturer.

Petitioner was faced with the dilemma of having to absorb the increased costs by substituting Respondent's proposal for the unspecified and unapproved Morris Pump proposal. Petitioner approached Respondent and requested that Respondent, in turn, substitute less expensive Continental motors in place of Westinghouse motors and less expensive Autocon controls in place of Westinghouse controls. Petitioner's request was made to Respondent because some of the other

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[4] The other specified pump manufacturer, DeLaval Turbine, could not be substituted because DeLaval had declined to make a lump sum proposal for all three elements of the major equipment. A lump sum proposal was required by the bid documents.

pump manufacturers, which had made proposals to Petitioner, had proposed to subcontract for Continental motors and Autocon controls in their proposals to Petitioner. Respondent acceded to Petitioner's request, obtained quotes from both Continental (for motors) and Autocon (for controls) and changed its total price in order to make a downward revision from the price quoted in its May, 1974 proposal.[5]

On August 24, 1974, Respondent sent to Petitioner what Petitioner's project manager admitted was Respondent's "revised proposal." Respondent's revised proposal, which substituted Continental Motors and Autocon Controls, stated in its caption:

> Subject: Little Miami STP, Contract 3
> Our Proposal CLV 129-74E-PL

The proposal number is the same as Respondent's May, 1974 proposal number. In addition, the revision referred, in the past tense, to the equipment: "We [Worthington] have offered". The revised proposal incorporates by reference the technical data which previously had been sent to Petitioner with Respondent's original proposal in May, 1974. This included the detailed "supplementary information" required by the bid documents.

Respondent's revised proposal stated that, if shipment was to be made by December, 1975, the revised proposal must be accepted by August 28, 1974. On August 28, 1974, Petitioner gave its verbal acceptance to Respondent.

Thereafter, Respondent was substituted by Petitioner as the major equipment supplier under Item 21 in place of the unapproved supplier, Morris Pump. Respondent's detailed

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[5] In its petition, it is suggested by Petitioner that these facts arise out of a proffer which is claimed to have been improperly considered by the court of appeals. Petitioner's suggestion is incorrect. These facts are found in the written requirements of the bid documents, written proposals to Petitioner by other suppliers, correspondence between the City's consulting engineer and the District and the undisputed testimony of Respondent's sales engineer. *See also* footnotes 10 and 12 *infra*.

technical data and the "supplementary information" which had been submitted with its May, 1974 proposal as required by the bid documents, were reviewed by the design engineers for "compliance with the contract specifications." (This detailed data and information from Respondent was required to be incorporated in any award of contract 3A to Petitioner by the District. The bid documents stated that "[s]uch offerings are agreed to be an essential part of the proposal upon which a contract award will be made.")

Petitioner was awarded the contract.

Under date of October 2, 1974, Respondent transmitted to Petitioner its acknowledgment of the August 28, 1974 verbal acceptance of Respondent's May, 1974 proposal and Respondent's revised price quotation of August 26, 1974. This acknowledgment reiterated Respondent's limited warranty terms and conditions. They were the same terms and conditions as set forth in Respondent's May, 1974 proposal.

This acknowledgment was followed, on October 8, 1974, by Petitioner's *written* purchase order which was back dated to August 28, 1974, the date of Petitioner's verbal acceptance of Respondent's revised proposal.[6]

On November 8, 1974, Petitioner and Respondent agreed to a change in the terms of payment for the Item 21 equipment. The change was to "no retainage" instead of "90% on delivery 10% on acceptance not to exceed 180 days from shipment" which were the terms of payment stated in Respondent's May, 1974 proposal. Petitioner admitted that the change was a change from the terms of Respondent's May, 1974 proposal. These contract changes were then acknowledged by Respondent. The acknowledgment reiterated Respondent's limited warranty terms and conditions.

The items of pump unit equipment sold by or through Respondent were shipped and delivered during the last three quarters of 1976. The last items, two subcontracted Con-

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[6] The written purchase order was made by "Dugan & Meyers Construction Co., Inc." *See* footnote 3 *supra*.

tinental motors, were shipped on or about December 3, 1976; and they were received by Petitioner on or about December 10, 1976. Consequently, Respondent's 18 month extended warranty expired no later than June 3, 1978. It was for this reason that Respondent later refused to accept warranty responsibility for motor failures. The failures occurred after that date and well after the expiration of Respondent's extended warranty.

Under Item 21 of Contract 3A, the "Contractor" — in this case Petitioner — was responsible for "an installation complete in every detail."

As noted above, Contract 3 was made up of 44 individual work items. Many items, including Item 21, involved overlapping areas of responsibility. Included in the work to be performed under one item, including Item 21, was work to be performed or material to be supplied under other items by different general contractors, by different subcontractors and by different suppliers. Respondent's proposal was limited to that of a *major equipment offeror* under Item 21. As such, Respondent proposed to supply only three types of equipment and services to meet only a part of the detailed requirements of the Item 21 specifications. This was only a part of the equipment and services which would be necessary for the contractor (Petitioner) "to properly complete the work" under Item 21.

Respondent was *not* the supplier of a complete or integrated mixed liquor pumping system as specified under Item 21. That was Petitioner's responsibility. Respondent did *not* supply the Item 21 motor starters which are complex units in and of themselves. These were supplied by the electrical contractor, Bertke Electric Company. Respondent did *not* supply the Item 21 flow meters that determine which pump and motor units should be in operation; and Respondent did *not* supply the Item 21 instruments which were to measure the level of the effluent which in turn determined the speed of the pumps and motors. These were supplied by others. All of these various interrelated pieces of equipment, which went

together to make up a sophisticated system, were electrically joined one to another; but the responsibility for that was *not* Respondent's. The electrical contractor had that responsibility. In addition, electrical drawings by which all of these different pieces of the system were to be joined together and made to operate were *not* the responsibility of Respondent. That was the responsibility of Petitioner.

The items of equipment supplied by or through Respondent as a part of Item 21 of contract 3A, were but a part of a larger and more complex group of interrelated components which were intended to act in unison in order for the design concept set out by the District in the bid specifications to operate properly. The concept of the bid specifications involving Item 21 included the interrelationship of an extensive network of components such as the bases and mountings for the equipment, the piping which was attached to the pumps and the various channels, sumps, weirs and related controls which dictated the flow of effluent throughout the secondary treatment portion of the Plant. All of these were the responsibility of Petitioner and others. They were *not* the responsibility of Respondent.

In its May 1974 proposal, Respondent expressly stated that the proposal was made as to only 11 of 23 individual specifications of Item 21 of Contract 3A. Respondent excluded those specifications which were the responsibility of the general contractor (Petitioner) and the responsibility of others. In its revised price proposal, made on August 24, 1974, Respondent again explicitly referred only to the same 11 of the 23 specifications of Item 21 as being within its responsibility.

As previously noted, the last pieces of equipment to be provided by or through Respondent were received by Petitioner in early December, 1976. It was not until 6 months later that Petitioner installed the pumps and motors. Thereafter, they were aligned, test run and realigned at the Plant during the summer of 1977. Effluent was first brought through the Plant

in July, 1977. By September 1, 1977, all of the units had been started up and they operated properly. The City of Cincinnati made its final inspection under Contract 3A; and it accepted the secondary treatment portion of the Plant from Petitioner on October 10, 1977. The plant began operating fully in the spring of 1978.

As Petitioner's project manager testified, during the 10 month period between start up of the units by September 1977 and the end of June, 1978 there were no problems with the pumps and motors. "They seemed to run fine . . ."

On June 22, 1978, after expiration of its warranty, Respondent was advised of problems with two pump units. Although Respondent's warranty had expired, it dispatched a serviceman to the Plant. The two problems, respectively, were corrected or were considered insufficient to require correction.

Several months later and more than four months after expiration of its warranty, Respondent was notified by Petitioner that there were problems with the Continential motors which had been supplied by sub-contract through Respondent. Respondent informed Petitioner that Respondent's warranty had expired; and Respondent suggested that the problem be resolved with the manufacturer of the motors.

There was no evidence that Respondent's standard and specified "MN series mix flow pumps" were in any way defective; or that they failed to meet the specifications of the bid documents. The contrary was, in fact, shown to be the case.[7] Similarly, there was no evidence that the Continental motors failed to meet the specifications of the bid documents.[8] The

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[7] *See* footnote 8 *infra*.

[8] Prior to shipment, 6 of the 8 pumps delivered by Respondent were test run at Respondent's Maryland manufacturing facility; and the test results were approved by the City. The other two pumps were "witness tested" *in person* by City engineers at Respondent's manufacturing facility; and the tests were approved. Prior to shipment, all of the motors had been tested by

only evidence which was presented by Petitioner was that certain of the motors had suffered failures well after they had been placed into operation and well after Respondent's warranty had expired.

The evidence revealed that the failures were more likely than not attributable to the acts and omissions of the Petitioner, of the District or of others than the Respondent. Consideration of this issue, however, was unnecessary to the decision and judgment of the court of appeals.[9]

Petitioner declined at trial to present any evidence, expert or lay, which would support the implied warranty claims made by it.

Continental. Subsequent to on site installation of the equipment by Petitioner, the pumps and motors were test run and accepted by the City. Thereafter, in actual operation, the equipment "seemed to run fine" as Petitioner's project engineer testified.

[9] Evidence was adduced that the failures more probably than not resulted from one or more causes attributable to the acts or omissions of others than Respondent. Because there was no evidence of a failure of the motors to meet bid specifications or evidence of any defect in the motors, the court of appeals did not need to consider the issue of why the failures occurred and the applicability of this evidence as a defense. *See* footnote 13 *infra*.

The only witness called to testify as to the motor failures was *Petitioner's own witness*, a graduate electrical engineer and territorial sales representative for General Electric Company.

He was asked by the district court whether or not the motor failures resulted from manufacture of the motors or operation of the motors. He replied:

> "THE WITNESS: It would be one or the other or it could be both. I don't think I'm qualified to say whether it was from manufacture or whether from operations."

The court of appeals drew the same conclusion. (Pet.App. 16a).

ARGUMENT

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. SUMMARY OF ARGUMENT.

No "special and important reasons" are presented for allowance of a writ of certiorari in this case. (Sup. Ct. R. 17). The petition in this case simply asks that the Court interpret, as a matter of law, a contract for the sale of equipment. The petition also asks that the Court decide whether or not an implied warranty existed in the sale of the equipment and, if so, whether or not an implied warranty was breached. Each of these questions were decided against Petitioner.[10]

Two straight-forward issues were presented by Respondent to the court of appeals:

1. Whether an offer by Respondent to sell equipment to the bidder (Petitioner) on a municipal construction project, which included limited warranty terms, created a binding contract when the construction contract was awarded to the bidder and Respondent's offer was accepted; and

2. Whether liability accrues, under the law of the State of Ohio, for breach of an implied warranty when there was no proof of a failure of the equipment to meet the specifications of the contract and there was no proof of any defect in the equipment delivered.

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[10] Petitioners seek to turn the court of appeals' answers to these questions into an attenuated construct of constitutional issues. They claim that the court of appeals "has so far departed from the accepted and usual course of judicial proceedings" that the writ should be allowed. (Sup. Ct. R. 17). This construct is based upon the brief reference by the court of appeals, in its decision, to a portion of a two page proffer submitted by Respondent to the district court. (Pet.App. 9a). Petitioners contend that the proffer improperly was considered by the court of appeals. This is incorrect. However, even if the proffer was considered by the court of appeals, the proffer is unimportant to the judgment of the court of appeals as to either one or the other or all of the four independent issues each of which independently support the court of appeals' judgment. *See* footnote 12 *infra*.

The second issue becomes irrelevant if the first issue is decided in Respondent's favor. That is because Respondent's offer to Petitioner contained limited warranty terms and an admittedly valid disclaimer of implied warranties.

The court of appeals decided *both* issues in favor of Respondent even though a decision on only one issue would be sufficient to support the judgment of the court of appeals. Moreover, on the second of the two issues that it decided in Respondent's favor, the decision of the court of appeals was made on two alternative grounds either or both of which independently support the judgment of the court of appeals. And the first of the two alternative grounds itself was decided on two additional grounds each of which independently support the judgment of the court of appeals.

In addition to its decision that there were no implied warranties in the first instance (because such warranties properly had been disclaimed), the court of appeals also decided that:

1. There could be no implied warranties in any event because the elements of proof required to support such warranties, on two independent grounds, were not shown to exist; and

2. Even if it was proper to imply a warranty of merchantability or a warranty of fitness for a particular purpose, there was no evidence to show a breach of warranty.

Consequently, no special or important reasons exist and none are presented in this case for allowance of a writ of certiorari.

II. THE COURT OF APPEALS PROPERLY DETERMINED THAT AN EQUIPMENT SUPPLIER'S LIMITED WARRANTY TERMS AND ITS DISCLAIMER OF IMPLIED WARRANTIES IN AN OFFER TO SELL EQUIPMENT TO A SUCCESSFUL BIDDER ON A MUNICIPAL CONSTRUCTION CONTRACT WERE VALID AND ENFORCEABLE AND THAT THE DISTRICT COURT'S CONCLUSION TO THE CONTRARY WAS CLEARLY ERRONEOUS.

The court of appeals recognized that the validity and enforceability of Respondent's limited warranty terms contained in its offer to sell equipment to Petitioner was an ultimate question of law. (Pet.App. 3a). Nonetheless, the court of appeals applied the more stringent "clearly erroneous" standard of Fed.R.Civ.P. 52(a). In doing so, it concluded:

> Based on the entire record, we are left with the firm conviction that a mistake has been made in this case in the conclusion that Worthington's limited warranty terms were not part of its subcontract. (Pet.App. 11a).

On this ultimate question of law, the district court had concluded that Respondent's offer to sell the equipment, and the terms of that offer, had no legal effect whatever. (Pet.App. 38a-39a). The court of appeals correctly held that this conclusion was simply contrary to law. As the court of appeals stated:

> Even before the prime contract was awarded and the change to Worthington pumps approved, Worthington was obligated to furnish the pumps, motors and control equipment. See *United States* v. *McShain*, 258 F.2d 422 (D.C. Cir. 1958); Restatement (Second) of Contracts § 87 comment e, illustration 6. Lastly, the suggestion that somehow the joint venture was a new party on the scene was clearly incorrect. Dugan & Meyers through E.C.I., its wholly owned subsidiary, bid contract 3A and was awarded Contract 3A. Dugan & Meyers, for the

most part, conducted all the negotiations with Worthington. (Pet.App. 13a).

The court of appeals reviewed the evidence, the greater portion of which was documentary and the greater portion of which essentially had been ignored by the district court.[11] That documentary evidence showed that Respondent's May, 1974 offer and its August 26, 1974 price revision carried the identical quotation number. The price revision was designated as such; and it made reference to technical submissions included in the May, 1974 offer. It was admitted by Petitioner that Respondent's offer was verbally accepted on August 28, 1974. The verbal acceptance was acknowledged by Respondent using the same quotation number, referencing both its May, 1974 offer and August 26, 1974 revision and repeating its limited warranty terms. A subsequent amendment to the subcontract changed the terms of payment which previously had been referenced *only* in Respondent's May, 1974 offer.

"The basic data regarding . . . specifications and performance . . ." required by the bid documents had been submitted by Respondent in its May, 1974 offer. (Pet.App. 13a). As the court of appeals stated and as the requirements of the bid documents unequivocably state, the prime contract could not have been awarded to Petitioner:

> [W]ithout consideration and approval by the District of Worthington's letter proposals of May 15, 1974 and May 17, 1974, since the forms of proposal required a detailed submission of certain data which was outlined in these letters. Clearly, these letters together with the letter of August 26, 1974 constituted Worthington's offer to furnish the pumps, motors and control panels. (Pet.App. 14a).

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[11] In several instances, the district court's findings were shown to be explicitly contradicted by the record. (*E.g.* Pet.App. 12a and 12a, n.8). *See* footnote 2 *supra*.

This is not a case in which the district court's "finding is based on a decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence . . ." *Anderson* v. *City of Bessemer* 470 U.S. ____, 53 U.S.L.W. 4314, 4317 (March 19, 1985). This is a case in which the coherent and facially plausible testimony, which "was rather meager" (Pet.App. 8a), was accepted by the court of appeals together with the extrinsic, documentary evidence which was determinative. This was a case in which the court of appeals rigorously applied the standard of review insisted upon by this Court (Pet.App. 11a) and insisted upon by Petitioners. (Pet. 17-18). This case presented to the court of appeals a situation not unlike the situation addressed by this Court in *United States* v. *United States Gypsum Co.*, 333 U.S. 364 (1948). In that case, "the government relied very largely on documentary exhibits." *Id.* at 395. This case, as Petitioners point out, "required analysis of thousands of pages of documentary evidence." (Pet. 4). As this Court has pointed out, "where . . . testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact." *Id.* at 396. *United States Gypsum*, cited by and relied upon by Petitioner in its petition, provides direct authority for the notion that a trial court's findings should be held to be clearly erroneous when, although there might be evidence to support them, the reviewing court, in evaluating the evidence is left with the definite and firm conviction that a mistake has been made. *Id.* at 395. That is precisely what has taken place in this cause.

For these reasons, the court of appeals agreed with the district court's view that "the parties did not intend to reach a binding *oral* agreement as to the terms of the contract." (Pet.App. 8a) (emphasis added). Thus, the court of appeals did not have to go beyond the "extrinsic evidence." The court of appeals did not have to go beyond the naked language of the documents evidencing Respondent's agreement to sell the

equipment to Petitioner and the decisional law of Ohio for it to determine, as it properly did:

> The parties in fact agreed on Worthington's limited warranty. It was neither necessary nor appropriate to resort to the Code. See Squillante, *Warranty Sales Law in Ohio*, 31 Case W.Res. 211, 213 (1981); *Inglis* v. *American Motors Corp.*, 3 Ohio St.2d 132, 209 N.E.2d 583 (1965). (Pet.App. 15a).

As a result, the court of appeals properly reversed the judgment of the district court. The basis for its action presents no "special and important reasons" for allowance of a writ of certiorari; and the writ should not be allowed.

Although it would have been unnecessary to the court of appeals' judgment, the court of appeals went on to reverse the district court on alternative grounds which are discussed below.

III. THE COURT OF APPEALS PROPERLY DETERMINED THAT IMPLIED WARRANTIES COULD NOT BE CREATED UNDER OHIO LAW WHEN THE PURCHASER OF EQUIPMENT DID NOT RELY ON THE SKILL AND JUDGMENT OF THE EQUIPMENT SUPPLIER AND THAT THE DISTRICT COURT'S CONCLUSION TO THE CONTRARY WAS CLEARLY ERRONEOUS.

The court of appeals was more than cognizant of the standard of review it was required to follow:

> The district court filed detailed findings of fact and conclusions of law as required by Fed.R.Civ.P. 52. We have reviewed the findings and conclusions in light of the record as a whole. A finding is 'clearly erroneous' when, although there is evidence to support it, a reveiwing court is left with the definite and firm conviction

> that mistake has been made. *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948), *rehearing denied* 333 U.S. 869, 68 S.Ct. 788, 92 L.Ed. 1147; *Commissioner* v. *Duberstein*, 363 U.S. 278, 291, 80 S.Ct. 1190, 1199, 4 L.Ed.2d 1218 (1960). (Pet.App. 11a).

As the court of appeals stated:

> The district court's conclusion on imposing implied warranty liability depended on the conclusion that plaintiffs relied upon the skill and expertise of Worthington in the choice of motors. The district court's conclusion was *also* based on its rationale concerning the scope of the work undertaken by Worthington. (Pet.App. 15a) (emphasis added).

Both conclusions were found by the court of appeals to be clearly erroneous as a basis for imposing implied warranty liability under Ohio law. Ohio Rev. Code §§ 1302.27 and 28 (U.C.C. §§ 2-314 and 315).

As was pointed out in the concurring opinion of the court of appeals:

> The testimony indicated that the joint venture was a sophisticated business entity, whose participants had built several major sewage treatment plants in Kentucky, Ohio and Indiana. (Pet.App. 22a).

It was not necessary for the court of appeals to reach a conclusion one way or another *as to the effect of this undisputed fact.* That is because Respondent, regardless of its relative expertise vis-a-vis Petitioner, did not choose all of the specific items of equipment covered by the subcontract. Petitioner could not have relied on Respondent's "skill or judgment to select or furnish . . ." the equipment which was supplied by Respondent under subcontract to others.

The court of appeals noted that the bid documents required the listing of a specified pump manufacturer (Pet.App. 4a), that Petitioners had failed to do so (Pet.App. 6a) and that the

manufacturer which Petitioner had listed was unqualified. (*Id.*). Worthington was a specified manufacturer (Pet.App. 4a-5a); and it was substituted for the unspecified and unapproved manufacturer which had been listed by Petitioner. (Pet.App. 6a-7a). Respondent's revised offer proposed to supply Autocon Controls and Continental motors (*Id.*); and Respondent's sales engineer testified that this was done at Petitioner's request. (Pet.App. 11a).

As to this one matter, Petitioner conjectures that "the Court of appeals remarkably relied *in large part* upon 'A Proffer of Testimony . . .,' which Petitioner characterizes as "false." (Pet. 6, 13, 16) (emphasis added). Petitioner's conjecture of reliance by the court of appeals is misguided. Respondent's sales engineer's testimony was not rebutted. Moreover, the bid documents, correspondence with Respondent and with the District's consulting engineers are conclusive in rejection of Petitioner's conjecture.[12]

Moreover and of greater significance, is the documented fact that Petitioner could not have relied upon Respondent's "skill and judgment" to supply the complete mixed liquor (Item 21) system as the district court erroneously had concluded. It was Petitioner's responsibility, not Respondent's to provide "an installation complete in every detail . . ." (Pet.App. 4a).

The court of appeals correctly stated:

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[12] The court of appeals had no need to rely upon the proffer for any purpose. The court of appeals simply noted that the one element of the proffer referred to by it was circumstantiated by the unrebutted testimony of Respondent's sales engineer. (Pet.App. 10a-11a). Because of its corroboration and because of the fact that the proffer was based upon documentary evidence *later* introduced at trial *by the Petitioner*, the proffer properly could have been considered by the court of appeals had it desired to do so. *F.H. McGraw & Co.* v. *Milcor Steel Co.*, 149 F.2d 301 (2d Cir.), *cert. denied*, 326 U.S. 753 (1945) (interpreting Fed. R. Civ. P. 43(c)), *but see Christensen* v. *Felton*, 322 F.2d 323, 328 (9th Cir. 1963) (interpreting Fed. R. Civ. P. 43(c)). Nonetheless and as noted above, the judgment of the court of appeals did not require consideration of the proffer; and the judgment was not based upon the proffer. *See* footnotes 5 and 10 *supra*

> [T]he district court defined the scope of the work performed by Worthington in considerably broader terms than is reflected *in the documents*. (Pet.App. 3a) (emphasis added).

Consequently, the district court's finding, contrary to the extrinsic documents and evidence, that Respondent had supplied *all* of the component parts for the mixed liquor pumping system, was "not correct." (Pet.App. 17a-18a). As the court of appeals pointed out:

> Had this been the parties' actual intention it would have been a simple matter for Worthington to have proposed to be responsible for Item 21 in its entirety rather than the discrete parts described in its May 15, 1974 and August 26, 1974 letters. (Pet.App. 17a. *See also* Pet.App. 5a, 16a and 18a).

Respondent explicitly declined, in its proposal to Petitioner, to undertake the responsibilities which the district court sought to impose upon it, contrary to the explicit terms of the documents before the district court. For this reason, the court of appeals properly determined that the district court's findings and conclusions were clearly erroneous.

Neither of the two, independent determinations made by the court of appeals as to the non-existence of implied warranties constitute "special and important reasons" for allowance of the writ.

The judgment of the court of appeals also stands upon an additional and independent ground which also is neither "special" nor "important"; and this is discussed below.

IV. THE COURT OF APPEALS PROPERLY DETERMINED THAT, EVEN IF RESPONDENT WAS OBLIGATED UNDER AN IMPLIED WARRANTY, THERE WAS A COMPLETE FAILURE OF PROOF THAT SUCH A WARRANTY WAS BREACHED AND THE DISTRICT COURT'S CONCLUSION TO THE CONTRARY WAS CLEARLY ERRONEOUS UNDER OHIO LAW.

In the final branch of its decision, the court of appeals was willing to *assume* that implied warranties *had been created in this case.* It was willing to accept the two conclusions of the district court which it had otherwise determined were clearly erroneous. (Para. III, *supra.*) The court of appeals stated:

> Assuming Worthington was obligated under an implied warranty as to its work based on these conclusions [Para. III *supra*] absent a finding that the equipment delivered by Worthington did not meet the specifications or that there were defects in the equipment at the time it was delivered, Worthington is not liable. *McDonald* v. *Ford Motor Co.*, 42 Ohio St.2d 8, 326 N.E.2d 252 (1975). (Pet.App. 15a-16a).

The *McDonald* case succinctly states the burden of proof required to be carried in Ohio in order to show a breach of implied warranty.

> The plaintiff's burden of proof for breach of implied warranty . . . consists of alleging and proving, by a preponderance of the evidence, that: (1) There was, in fact, a defect in the product manufactured and sold by the defendant; (2) such defect existed at the time the product left the hands of the defendant; and (3) the defect was the direct and proximate cause of the plaintiff's injuries or loss. *McDonald* v. *Ford Motor Company*, 42 Ohio St.2d at 10.

Throughout its prosecution of this action, Petitioner has assumed (and still assumes) that the burden of proof was

upon the Respondent. Petitioner assumes that Respondent was required to prove why the system which was installed by Petitioner experienced the failures which occurred.[13] Consequently, Petitioner elected to present no evidence whatever which would support any of the elements of proof required by Ohio law to show breach of an implied warranty.

As to whether or not there had been a breach of implied warranty, the court of appeals was not required to reverse any finding by the district court. There was no finding. As to this issue, the court of appeals also was not required to interpret the record. The record was clear:

> [T]he district court did not make an express finding on the cause of the failure of the motors and there is nothing in the record which indicates whether the failure of the motors to operate properly was caused by a defect in their manufacture or as a result of the way the system is operated. (Pet.App. 16a).

Consequently, the court of appeals properly concluded:

> [T]he burden in the first instance was on plaintiffs to show the existence of a defect in the equipment supplied by Worthington at the time of delivery. In light of plaintiffs complete failure to introduce evidence that the equipment supplied by Worthington did not meet plaintiffs' specifications or was in some way defective, Worthington was not shown to have breached an implied warranty of merchantability. (Pet.App. 20a).

On this additional ground, the judgment of the court of appeals is fully and independently supported. There is no "special and important reason" for allowance of the writ; and it should not be allowed.

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[13] Respondent has argued below that such a burden was in fact carried by Respondent although there was no requirement that Respondent carry any burden at all in this respect. *See* p. 11 and footnote 9 *supra*.

V. CONCLUSION

The issues presented to the court of appeals involved matters of contractual responsibilities and obligations between two sophisticated parties, a manufacturer of pumps on the one hand and a general construction bid contractor on the other hand. The issues involved straight-forward questions of Ohio law concerning offer and acceptance and implied warranties.

The judgment of the district court was reversed by the court of appeals, not on one ground but on four independent and separate grounds, each of which independently support the judgment of the court of appeals.

In the process of arriving at its judgment, the court of appeals meticulously articulated (and rearticulated) the standard of review to which it was restricted. (Pet.App. 3a, 11a). The court of appeals also articulated its application of that standard of review to the district court's findings and conclusions. This was done as to each of the issues before it and each of the issues which it decided.

Petitioner's claim of deprivation of constitutional rights in the context of this case is captious. No "special and important reason" for review is presented by the petition. The writ should not be allowed and Respondent should be awarded such costs and fees as are permitted by law and by Court rule.

Respectfully submitted,

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PROOF OF SERVICE

CERTIFICATE BY BAR MEMBER

I, WILLIAM R. HARDY, Hereby certify:

1. That I am a member of the Bar of the United States Supreme Court; and

2. That three copies of the Brief for the Respondent in Opposition to the Petition for Writ of Certiorari were served on all parties required to be served, including the individual listed below at the address listed for such individual, by depositing such copies in the United States post office, with first-class postage prepaid, on May 10, 1985:

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